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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	12
Conclusion	18
Appendix A – Statute Involved	19
Appendix B – Order and Opinion Below	20

TABLE OF CITATIONS

CASES:

Boykin v. Alabama, 395 U.S. 238 (1969) 12, 13, 14, 15, 16, 18

Douglas v. Alabama, 380 U.S. 415 (1965) 12

Gervin v. State, 212 Tenn. 653, 371 S.W.2d 449 (1963) 16

Johnson v. Zerbst, 304 U.S. 458 (1938) 13

Kercheval v. United States, 274 U.S. 220 (1927) 11

Machibroda v. United States, 368 U.S. 491 (1962) 12, 17

McCarthy v. United States, 394 U.S. 459 (1969) 13, 16, 17, 18

Shelton v. United States, 242 F.2d 101 (1957), 246 F.2d 571 (1957), 356 U.S. 26 (1958) 17, 18

State v. Sisco, 169 N.W.2d 542 (S.Ct. Iowa 1969) 14

Von Moltke v. Gillies, 332 U.S. 708 (1948) 14, 15

STATUTES:

Tennessee Code Annotated:

Section 39-603 . . . . . 3, 16

Section 39-604 3

Section 39-605 3

Section 40-2310 . . . . . 3, 4

MISCELLANEOUS:

American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty, Approved Draft 1968 . . . . . 14, 17

Federal Rules of Criminal Procedure, Rule 11 13

Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas,* 112 U. Pa. L. Rev. 865 (1964) 18

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Fred W. Burdette, Sr. prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled case on June 16, 1969.

CITATIONS TO OPINIONS BELOW

The order of the Circuit Court of Sumner County, Tennessee, is unreported and is printed in Appendix A hereto, *infra*, p. 20. The opinion of the Criminal Court of Appeals for the State of Tennessee, unreported at the date this

petition is being filed, is printed in Appendix B hereto, *infra*, p. 22. The orders of the Supreme Court of Tennessee denying petitions for a writ of certiorari and a rehearing of the petition are unreported, and contained in the record, R. 116, 118.

JURISDICTION

The judgment of the Criminal Court of Appeals for the State of Tennessee was entered on December 13, 1968. The petitioner's timely filed Petition for Writ of Certiorari was denied by the Supreme Court of Tennessee on April 21, 1969 and a Petition to Rehear Petition for Certiorari was denied by the Supreme Court of Tennessee on June 16, 1969. The time within which to file a Petition for Writ of Certiorari in this Court was extended from September 15, 1969 to October 15, 1969 in an order issued by the Honorable Potter Stewart on September 10, 1969, further extended from October 15, 1969 to October 27, 1969 in an order issued by the Honorable Potter Stewart on October 9, 1969 and again extended from October 27, 1969 to November 1, 1969 in an order issued by the Honorable Potter Stewart on October 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

In the proceedings below petitioner and his son were jointly charged in a two-count indictment with assault with intent to commit rape and assault with intent to commit murder. The prosecution agreed to permit the son to plead guilty to the second count and receive a stipulated punishment if, and only if, petitioner whose involvement in the alleged criminal activities was peripheral, would also plead guilty to an attempt to commit a felony, a charge which requires specific criminal intent under Tennessee law. The question presented is:

> Whether under the circumstances described above, the trial judge's acceptance of petitioner's guilty plea without first determining affirmatively on the record that it had been made intelligently and voluntarily was an unconstitutional deprivation of petitioner's privilege against self-incrimination.

STATUTE INVOLVED

The statute involved in this case, Tennessee Code Annotated, § 40-2310 (1968 cumulative supplement 209), is contained in Appendix A hereto.

STATEMENT

On August 25, 1967, petitioner, his son Fred W. Burdette, Jr., and one Joe Crawford, were jointly indicted by the Grand Jury for the Circuit Court of Sumner County, Tennessee, in a two-count indictment charging each of them under Tennessee Code Annotated Sections 39-605 and 39-604, with assault and battery with intent to have carnal knowledge of one Faye Jarrell Esposito and assault with the intent to murder the same Mrs. Esposito. (R. 4)[1] Conviction under each of the charges is punishable by a sentence of not less than 10 nor more than 21 years in the penitentiary.

The case was called for trial on January 15, 1968, at which time Crawford was granted a severance. A jury was duly empaneled and sworn. The trial judge, out of the presence of the jury, then proceeded to question the prosecutor concerning an agreed upon disposition of the charges against petitioner and his son whereby petitioner was to plead guilty to attempt to commit a felony (Tenn. Code Ann. § 39-603) and his son was to plead guilty to assault and battery with intent to commit murder in the first degree as charged in the second count of the indictment. The agreement also called for a recommendation of punish-

[1] The record of the proceedings below are cited herein as "R. ___." Due to an apparent inadvertance by counsel or a clerk in one of the courts below, the transcript of an oral argument held before the trial court on petitioner's "Motion for New Trial" was not a part of the record certified to the Supreme Court of Tennessee. However the transcript was quoted in briefs to the Court and was relied upon by petitioner below. The transcript as attested to by the court reporter and counsel for petitioner is being submitted to this court as a part of the record, and is cited herein as "Arg. ___."

ment on the part of the prosecutor whereby petitioner would receive a sentence of 11 months and 29 days in jail and his son would receive a ten-year sentence in the State Penitentiary. (R. 27-28, 36)

Under Tennessee law, Tennessee Code Annotated Section 40-2310, the recommendation for disposition and punishment must be submitted to and accepted by a jury before judgment can be rendered on the plea.[2] In compliance with this provision, the prosecutor related a summary of the facts in the case to the jury.

The prosecutor's statement indicated that Mrs. Esposito, the complainant, had worked on a part-time basis as a clerk-typist for petitioner and his son in their business of arranging musical shows for police and fire department benefits. On the afternoon of July 21, 1967, petitioner drove Mrs. Esposito from her home to the home of petitioner's son where she was to work. After explaining the nature of the work to be done, petitioner left, leaving Mrs. Esposito and petitioner's son together. Mrs. Esposito immediately noticed that the son, Burdette, Jr., had been drinking. Shortly after petitioner had left, his son asked Mrs. Esposito for a match and she "pitched him the matches". This act angered Burdette, Jr., and he drew a pistol and forced her to light his cigarette. Thereafter, with the pistol still drawn, Burdette, Jr. forced Mrs. Esposito into the bedroom of the house where he forced her to disrobe and get into a bed. However, he did not disrobe himself and made no attempt to sexually assault her. (R. 29-30)

The prosecutor further told the jury that during the course of these events "a colored man [Joe Crawford] who was working there in the garden at that time, came into the house and witnessed what took place." Burdette, Jr. told

[2] See Appendix A.

Crawford, who was unarmed, to tell Mrs. Esposito to follow orders or "he [Burdette, Jr.] would kill her." Crawford apparently left after a short period of time. (See R. 32) Burdette, Jr. continued to drink wine and whiskey while Mrs. Esposito was undressed. Mrs. Esposito was permitted to put her clothes back on. Although Burdette, Jr. made no physical attempt to sexually assault her he threatened such assault and "slapped her around considerable." Later, petitioner came back to the house and Mrs. Esposito begged him to help her. He responded that he couldn't help her, that he was afraid his son would shoot him. Burdette, Jr. decided that he needed to go to the bathroom and, after unsucessfully insisting that Mrs. Esposito accompany him, he gave the gun to petitioner who held the gun on Mrs. Esposito while his son was out of the room. Mrs. Esposito begged petitioner to let her get away while the son was out of the room, but petitioner refused saying someone might get hurt if they did not do what Burdette, Jr. ordered. Burdette, Jr. returned from the bathroom and shortly thereafter petitioner again left the house. Mrs. Esposito then escaped from Burdette, Jr. and ran out of the house. (R. 30-33)

With regard to the part played by petitioner in the events of July 21, 1967, the prosecutor told the jury:

> "I can't say from the facts and Mrs. Esposito hasn't indicated that she knows whether or not he would have actually killed her on that occasion when he had the gun. It was pointed in her direction. But she must have believed something that he might have done or she would have run at that time. So I think there is some reason to believe that he had a responsibility in this matter. I take no pleasure, and I'm sure no jury would, to send a man of his age to a common jail for eleven months and twenty-nine days, but I think it is a merciful sentence that I'm recommending under the circumstances." (R. 36)

After the prosecutor had completed his statement to the jury, the trial judge called petitioner, his son and their

counsel before the bench and, in open court before the jury, the following was said:

THE COURT: Now, Judge Durham [defense counsel] you represent these two defendants?

MR. DURHAM: Yes, Your Honor.

THE COURT: You have been employed by them to represent them, you were not appointed. Is that correct?

MR. DURHAM: That is correct.

THE COURT: Now do you agree that the resume of the facts which the Attorney-General has stated here would be substantially the testimony of the State?

MR. DURHAM: Substantially that would have been the testimony of their witnesses, Your Honor.

THE COURT: All right. Now, Mr. Fred Burdette, Jr., do you plead guilty to felonious assault with intent to commit murder in the first degree?

MR. BURDETTE, JR.: Yes, sir.

THE COURT: You do?

MR. BURDETTE, JR.: Yes, sir.

THE COURT: Mr. Burdette, Sr., do you plead guilty to an attempt to commit a felony?

MR. BURDETTE, SR.: Yes, sir.

THE COURT: Now, you gentlemen understand what you are doing? Your rights have been told to you by your attorney?

MR. BURDETTE, JR.: Yes, sir.

MR. BURDETTE, SR.: Yes, sir.

THE COURT: And you realize that you are pleading guilty?

MR. BURDETTE, SR.: Yes, sir.

THE COURT: Do you, Mr. Burdette, Jr.?

MR. BURDETTE, JR.: Yes, sir.

THE COURT: And you are doing it voluntarily?

MR. BURDETTE, SR.: Yes, sir.

MR. BURDETTE, JR.: Yes, sir.

THE COURT: All right. Have they signed the plea of guilty and the waiver of appeal?

MR. DURHAM: Yes, Your Honor. I have the waiver of appeal signed by them and by myself. (R. 37-38)

The "Plea of Guilty" signed by petitioner and his attorney reads as follows:

> "The defendant, appearing in person in this case, and having been fully advised by the Court of the crime charged against him, the punishment which could be meted out if the defendant is found guilty and of his constitutional rights therein hereby voluntarily pleads guilty to the offense of Attempt to Commit a Felony.
>
> "The defendant also states to the Court that his attorney being present, Honorable William Fred Durham has fully informed him of all of his rights and that after a full explanation of these rights, the defendant informed his attorney that he wanted to voluntarily enter a plea of guilty, and to this decision of the defendant, said attorney agrees." (R. 12)

Petitioner and his attorney also executed a "Waiver of Appeal" indicating that petitioner's decision to waive rights of appeal had been made "voluntarily after a full and complete discussion of same with his attorney." This document contained the statement that "his attorney agrees that defendant has no basis for appeal as there are no errors in the record." (R. 14)

On March 14, 1968, petitioner, by and through new counsel, filed a "Motion for New Trial" in the trial court, requesting the court to set aside the verdict of guilty and grant him a new trial on the grounds that the evidence did

not support the verdict and that he had "entered a plea of guilty in order to obtain a smaller sentence for his son, notwithstanding the fact that he was not guilty of any intentional wrong-doing." Evidentiary support for the motion was supplied by a certified copy of a transcript of the preliminary hearing held in the case on July 24, 1967 which was "made an exhibit to [the] motion by reference." (R. 15-16)

The prosecutor's statement to the jury did not differ from the testimony given at the preliminary hearing in any way material to the questions presented herein. However, the following excerpts from the testimony given at the preliminary hearing are pertinent to an understanding of the circumstances of petitioner's involvement in the alleged criminal acts and, consequently, his knowledge of the elements of the crime to which he plead guilty:

Mrs. Esposito testified that:

> Burdette, Jr. told her that "instead of killing me he was going to shoot me in the knees and watch me bleed to death." (R. 60)
>
> Burdette, Jr. spoke to petitioner over the telephone and said "if he came back over there he was going to blow his brains out." (R. 64)
>
> Burdette, Jr. "was drinking whiskey and he drank beer. I know that he was crazy. His eyes . . . He didn't know what he was doing and he couldn't walk straight." (R. 90)
>
> She "kept thinking that maybe he would just pass out in a minute from drinking so much whiskey." (R. 63)

The deputy sheriff who arrested Burdette, Jr. about two hours after Mrs. Esposito had escaped testified that:

> Burdette, Jr. was "in a drunken or drugged condition." (R. 102)
>
> At the scene of the arrest he ordered Burdette, Jr. out of an automobile and Burdette, Jr. refused saying "get away or I'll shoot you." (R. 100)

> When Burdette, Jr. got out of the car, instead of obeying the deputy's orders to raise his hands, "he started towards his pocket instead of raising them." Burdette, Jr. jerked his hand away from the deputy when threatened, but still refused to raise his hands and when the deputy "got about three feet from him he started for the pocket again" and the deputy had to forcibly disarm him. (R. 100)

With regard to the petitioner's reaction to his son's behavior, Mrs. Esposito testified that:

> "When I heard him using the bathroom I begged [petitioner] to let me out and he wouldn't do it. He said 'No if I let you out he will kill me' Everything that Fred, Jr. said his father backed him up as if he was scared of him or something." (R. 78)

> Petitioner told Mrs. Esposito that if he let her go, his son would "kill you and if I let you go he will kill me." (R. 91)

During the course of the oral argument on petitioner's Motion for a New Trial, the trial judge, in responding to an assertion by petitioner's counsel that petitioner's guilty plea had been agreed to in an effort to save his son from a possible 21-year prison sentence, asked the prosecutor:

> "No[w], General, to refresh my memory and I may be incorrect in this. Wasn't the Burdette, Jr. sentence agreed to before it was ever agreed to let Mr. Burdette, Sr. plead guilty to an attempt to commit a felony?" (Arg. 11)

The prosecutor responded by stating:

> "Your Honor, this is outside the record. I would have to say that the plea of guilty in both cases, *and this is in some support of the motion that has been made,* that they were part and parcel of the same agreement. I would have to say that, that we did not accept the plea of guilty of Burdette, Jr. without the plea of guilty of Burdette, Sr., so they were both presented." (Arg. 11-12; emphasis added.)

The trial court entered a written order on March 1, 1968 denying petitioner's Motion for a New Trial. (Appendix B hereto, p. 20.)

On March 27, 1969, petitioner filed a Petition for Certiorari and Supersedeas in the Criminal Court of Appeals for the State of Tennessee, alleging *inter alia* that

> "petitioner, out of distress and concern for his son, entered a plea of guilty to prevent his son from receiving a more severe sentence, which he was compelled to do. This plea was not in truth and fact of his own free will and accord, or that he was guilty of any offense."

The petition was granted March 27, 1969 and the writs of certiorari and supersedeas were issued

As a part of his attack on the judgment of the trial court, petitioner also filed a motion in the appellate court requesting permission to file a certified copy of the preliminary hearing transcript. In a decision, released December 13, 1968, the Tennessee Criminal Court of Appeals affirmed the trial court's denial of petitioner's Motion for New Trial, and denied his motion to have the preliminary hearing transcript made a part of the record, holding that since the transcript "was not an exhibit below and is not a part of the bill of exceptions, we cannot consider it." The Court then weighed the only "evidence" in the case, the prosecutor's statement to the jury, and stated that "[t]he assignments saying there is no evidence to support the verdict of guilty and that the evidence preponderates against it are overruled." (Appendix B hereto, p. 24.)

In disposing of petitioner's other points, the Court stated:

> "By assignments of error the defendant contends that he was forced at gun point to aid and abet his son, that he only pretended not to help the victim in order to save his life as well as hers and to prevent a tragedy, that his guilty plea was made only to obtain a smaller sentence for his son, and the evidence at the preliminary hearing shows that the defendant had no intent to harm the victim and

> was helpless to assist her. *These allegations are not sustained by the evidence stipulated and presented to the Court and jury.* The assignments based on them must be overruled." (Appendix B hereto, p. 24; emphasis added.)

On March 12, 1969, petitioner filed a "Petition for a Writ of Certiorari and Supersedeas, Assignment of Errors and Brief" in the Supreme Court of Tennessee, arguing, *inter alia,* that:

> "From a review of the transcript of the proceedings at the preliminary hearing, it is apparent that petitioner has committed no indictable offense. That the grounds contained in his motion for a new trial are fully sustained by the record. That his plea of guilty was in fact forced upon him for the compelling reason to effectuate a smaller sentence for his son."

The Supreme Court of Tennessee issued an order, without opinion, on April 21, 1969, denying certiorari. (R. 116) Thereupon petitioner, on May 13, 1969, filed a "Petition to Rehear Petition for Certiorari" alleging that his plea had not been freely and voluntarily made but had been entered into in an effort to protect his son whose plea and agreed upon punishment would not have been accepted by the prosecutor if petitioner had refused to plead guilty and had exercised his rights to a trial. In urging the Supreme Court to reverse the decisions of the lower courts, petitioner argued that:

> "the action of the honorable trial judge in failing to immediately void the conviction of your petitioner and grant him a new trial on his motion was error in view of the authorities which control pleas of guilty, said authorities being both from the United States Supreme Court and this Honorable Supreme Court."

In his "Brief of Law in Support of Petition", petitioner cited and briefly discussed this Court's decisions in *Kercheval v. United States,* 274 U.S. 220 (1927) and *Machibroda*

v. United States, 386 U.S. 487 (1962), both of which treat the question of the acceptance and withdrawal of guilty pleas.

The Supreme Court of Tennessee denied petitioner's "Petition to Rehear Petition for Certiorari" in an order, without opinion, issued on June 16, 1969. (R. 118)

REASONS FOR GRANTING THE WRIT

1. The procedures employed by the trial court conflict with the requirements set forth by this Court in *Boykin v. Alabama,* 395 U.S. 238, decided June 2, 1969. Although the trial court below and the Tennessee Court of Criminal Appeals decided this case prior to the issuance of this Court's decision in *Boykin v. Alabama,* the Supreme Court of Tennessee's refusal, in an order released two weeks *after* the issuance of the *Boykin* decision, to even examine the instant case through the issuance of a writ of certiorari indicates that there is a need for this Court to reiterate its holding in *Boykin.*

In *Boykin* a guilty plea was accepted by the trial judge without addressing any questions to the defendant. This Court held that

> "it was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242.

A guilty plea involves the waiver of several constitutional rights and the requirements for passing on the constitutionality of such waivers are governed by federal standards. *Boykin v. Alabama, supra,* at 243, citing *Douglas v. Alabama,* 380 U.S. 415, 422 (1965). The *Boykin* opinion quotes with approval from the decision in *McCarthy v. United States,* 394 U.S. 459 (1969) as follows:

> ". . . For this waiver to be valid under the Due Process Clause, it must be an 'intentional relinquishment or abandonment of a known right or privilege'." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (395 U.S. at 243, footnote 5.)

Although this Court, in *Boykin,* did not expressly adopt the specific standards of Rule 11 of the Federal Rules of Criminal Procedure to govern the acceptance of guilty pleas in state courts, it did hold that waiver of such constitutional rights

> "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. When the judge discharges that function, he leaves a record adequate for the review that may be later sought." (395 U.S. 243-244.)

The record[3] below, while not silent as was the case in *Boykin,* is cursory and superficial and obviously does not reflect the "utmost solicitude" of the trial court in canvassing the matter of the plea with petitioner. Nor is the record adequate for a reviewing court to determine that the plea was "intelligent and voluntary."[4] Thus, the only questions propounded to petitioner by the trial court were:

> "Now, you gentlemen understand what you are doing? Your rights have been told to you by your attorney?

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[3]R. 37-38, printed in full in the Statement, *supra,* at pp. 6-7.

[4]*Boykin, supra,* 395 U.S. at 242.

"And you realize that you are pleading guilty?

"And you are doing it voluntarily?"

To each question propounded, petitioner answered: "Yes, sir." (R. 38)

The written "Plea of Guilty"[5], although containing conclusionary language, indicating petitioner had been "fully advised by the Court of the crime charged against him, the punishment which could be meted out . . . and of his constitutional rights" and that his attorney had "fully informed him of all his rights", lacks the type of specificity necessary to indicate the true knowledge which is required on the part of a defendant before this Court will approve a waiver of a constitutional right. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948.) As the Court indicated in *McCarthy v. United States, supra*, "[T]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (394 U.S. at 470, emphasis in original.) The Supreme Court of Iowa has recently reversed a trial court's acceptance of a guilty plea in a similar case and in doing so has construed *Boykin* and other decisions of this Court to require that

> "when a guilty plea is entered by a defendant, the Court must address the accused personally and by that procedure heretofore described determine whether he understands the charge made, is aware of the penal consequences of the plea and that it is entered voluntarily. Nothing less will suffice. *State v. Sisco*, 169 N.W.2d 542, 549 (S. Ct. Iowa, released July 24, 1969) (opinion of a minority of the Court). See also *ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty*, § 1.4, Approved Draft 1968.

Thus, the disposition of this case by the Supreme Court of Tennessee is clearly in conflict with decisions of this Court and the decision of at least one state Supreme Court. For

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[5]R. 12.

these reasons a writ of certiorari should issue so that the Court may consider the conflict and issue a clarifying opinion indicating that "a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver," *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), no more satisfies the requirements for a valid waiver of constitutional rights than did the silent record in *Boykin v. Alabama*.

2. As the foregoing discussion indicates, the decision below is clearly erroneous and this Court should grant this petition to correct the injustice rendered to petitioner. In many cases, the injustice worked by a trial court's failure to employ procedures such as those set forth by *Boykin v. Alabama, supra*, are not evident on the record. The entering of a guilty plea is obviously a special situation where the defendant and his lawyer want the plea to be accepted and will remain silent even if possible constitutional problems are apparent. As the Court stated in *Boykin*, "[I]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243.

However, in the instant case, even though the trial judge did not have the benefit of the requirements so explicitly stated by this Court in *Boykin* to guide him, he should have been on notice of the possibility that ignorance and coercion might have effected petitioner's decision to enter a plea, and should have taken some steps beyond the perfunctory questioning indicated by the record to guard against such occurrence.

Thus, where a father and son are jointly charged with a serious crime which was admittedly committed by the son and the father was involved only peripherally, the Court should have been alert to the possibility of the prosecution demanding the father's plea in return for a promise of leniency in the punishment of the son. The coercion inherent in such a situation is obvious and at the argument on petitioner's Motion for a New Trial, the prosecutor readily ad-

mitted that the plea and agreement as to punishment for petitioner's son were accepted only after petitioner had agreed to enter a guilty plea. (Arg. 11-12).

Similarly, where the facts related to the jury indicated that at the time the assault took place petitioner may have been acting out of fear of his son, rather than his own free will,[6] the trial judge should have been alerted to the possibility that petitioner did not understand the doctrine of "specific intent" as it applied to his actions in this case. Since the crime to which petitioner pleaded guilty—attempt to commit a felony (Tenn. Code Ann. § 39-603)—includes the element of specific intent under Tennessee law, *Gervin v. State*, 212 Tenn. 653, 657, 371 S.W. 2d 449 (1963), petitioner could not have intelligently pleaded guilty without an explanation of the doctrine. See *McCarthy v. United States, supra*, 349 U.S. at 470-471. The record below does not contain any indication whatsoever that the petitioner possessed the "understanding of the law in relation to the facts" which is necessary before a waiver of his constitutional rights can be adjudged valid. *McCarthy v. United States, supra* at 466.

Thus, the instant record presents a more compelling showing of an abuse of substantive rights than the mere silent record of *Boykin*. It contains the possibility of a plea to a charge that the defendant did not understand—as was the case in *McCarthy, supra*—and the possibility that the plea was the result of a "plea-bargain" which was inherently coercive. Under the circumstances, this petition should be granted for the purpose of correcting the error of the Tennessee appellate courts, and if the Court believes that full briefing and oral argument are unnecessary due to the decision in *Boykin*, the decision of the Tennessee Court of Criminal Appeals should be summarily reversed and the judgment below vacated.

3. The record below presents this Court with the opportunity to rule on an important aspect of the administration of justice in the criminal trial courts. As the Court acknowl-

[6] See R. 31.

edged in *McCarthy v. United States, supra,* approximately 86% of all convictions obtained in U.S. District Courts during 1968 were obtained pursuant to a plea of guilty. 394 U.S. at 459, footnote 7. The ABA's Project on Minimum Standards of Criminal Justice has indicated that in some jurisdictions, 95% of the criminal cases are disposed of through guilty pleas and a "substantial number of these pleas are the result of prior dealings between the prosecutor and the defendant." *Standards Relating to Pleas of Guilty,* Approved Draft 1968, 1, 60. As the record below graphically demonstrates, the processes of so-called "plea-bargaining" are open to abuse. As stated by the ABA's study group:

> "Trial judges, although they are aware that negotiation for pleas is a common practice, routinely ask the defendant whether any promises have been made to him. Notwithstanding the fact that the plea has been the subject of negotiation, the defendant usually answers in the negative and the prosecutor and defense counsel seldom indicate to the contrary * * * As a result the negotiation process remains largely invisible, informal, and not subject to any systematic control." *Standards Relating to Pleas of Guilty,* Approved Draft 1968, 61.

This Court has stated that a "guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void". *Machibroda v. United States,* 368 U.S. 491, 494 (1962). However, the Court has never closely examined and ruled on the constitutionality of "plea-bargaining" and the procedural safeguards which, if followed, might permit a valid waiver of constitutional rights when a defendant pleads guilty as part of an agreement with the prosecution. As the ABA Project points out, there is considerable uncertainty about the legal status of "plea-bargaining" due to the case of *Shelton v. United States,* in which the United States Court of Appeals for the Fifth Circuit first vacated a sentence on the grounds that it was received as a result of an inducement to plead guilty, 242 F.2d 101 (1957) and then reversed itself on rehearing, hold-

ing the plea was voluntary. 246 F.2d 571 (1957). On petition for writ of certiorari to this Court, the Solicitor General confessed error, and in a memorandum decision without opinion, the Court granted the petition and reversed the Fifth Circuit's holding that the plea was voluntary. 356 U.S. 26 (1958). See also, Note, *Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas,* 112 U. Pa. L. Rev. 865, 871-873 (1964).

Since during the last term, in *McCarthy* and *Boykin,* the Court announced new procedures to be followed in protecting the constitutional rights of defendants who plead guilty, this would appear to be an appropriate time to consider and rule upon the procedures to be adopted to protect defendants who have entered pleas of guilty in reliance upon an agreement with the prosecution. The record below which indicates that even though the trial judge knew petitioner's plea to be the product of a potentially coercive bargaining situation, he failed to inquire into the circumstances surrounding the agreement, affords this Court a good vehicle for deciding the important unanswered questions concerning "plea-bargaining."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted

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October 27, 1969

APPENDIX A

STATUTE INVOLVED

Tennessee Code Annotated, Section 40-2310 (1968 Cumulative Supplement 209), reads as follows:

> "Fixing Penalty on Plea of Guilty - Upon the plea of guilty, when the punishment is confinement in the penitentiary, a jury shall be impaneled to hear the evidence and fix the time of confinement, unless otherwise expressly provided by this Code. Provided, however, that if the defense does not request a trial on this plea of guilty, and has agreed to accept the punishment recommended in the case on the plea of guilty, in the discretion of the court a resumé of the facts of the case shall be related to the jury by the state and stipulated and agreed to by the state and the defense as being the substantial facts and evidence in the case to be considered by the jury as such facts and evidence, and the jury may then approve the recommendation and be sworn to fix the punishment. In such pleas of guilty by stipulation and agreement, the judge shall not be required to change the jury in writing or otherwise."

APPENDIX B

ORDER AND OPINION BELOW

MINUTES CIRCUIT COURT SUMNER COUNTY, TENNESSEE, FEBRUARY TERM, 1968 MINUTES FOR MARCH 1, 1968

COURT OPENED PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE THOMAS BOYERS, III, JUDGE WHEN THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD, TO-WIT:

MINUTE BOOK 57 - PAGE ____

STATE OF TENNESSEE
VS: # 303
FRED BURDETTE, SR.

ORDER

This cause came on to be heard on the 1st day of March, 1968, before the Honorable Thomas Boyers, III, Judge of the Circuit Court of Sumner County, Tennessee, on motion of the defendant Fred Burdette, Sr., for a new trial. Upon argument of counsel and presentation of written motion to the Court, which motion the Court denied, including the request of the defendant to be permitted to file the transcript of the proceedings had at the preliminary hearing.

And it further appearing to the Court that counsel for the defense requested of the Court that they be allowed to appeal this cause, the Court denies defendant and counsel the right to appeal, on the grounds that the defendant executed a valid and voluntary waiver of a motion for new trial and an appeal which is a part of this record.

Whereupon exceptions were taken by defense counsel, both to the Court's ruling concerning the Motion for New Trial and to the Court's denial of defendant's right to appeal.

The Court after denying the Motion and the right to appeal, does hereby Order the defendant, Fred Burdette, Sr., to report to the Sheriff of Sumner County, Tennessee, on March 29, 1968, to be incarcerated in jail and to serve the sentence heretofore imposed in this cause. However, the defendant may remain on bond until that time.

Thereupon Court was adjourned.

/s/ Thomas Boyers, III
JUDGE

APPROVED:

/s/ Joe P. Binkley
/s/ Howard F. Butler
ATTORNEYS FOR DEFENDANT

THEREUPON COURT ADJOURNED UNTIL MARCH 4, 1968 AT 9:00 A.M.

/s/ Thomas Boyers, III
JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

MAY 1968

APPEAL IN ERROR
FROM THE CIRCUIT COURT OF SUMNER COUNTY
HONORABLE THOMAS BOYERS, III, JUDGE

FRED BURDETTE, SR., Plaintiff in Error,	)	
v.	)	SUMNER CRIMINAL
STATE OF TENNESSEE, Defendant in Error.	)	

For The Plaintiff In Error:

Howard F. Butler
Joe P. Binkley
Nashville, Tennessee

For The Defendant In Error:

George F. McCanless
Attorney General
Nashville, Tennessee

Albert D. Noe, IV
Assistant Attorney General
Nashville, Tennessee

James M. Porter
District Attorney General
Springfield, Tennessee

JUDGMENT AFFIRMED
OPINION BY JUDGE MARK A. WALKER
FILED: December 13, 1968

OPINION

Fred Burdette, Sr., the defendant below, was jointly indicted with his son, Fred Burdette, Jr., and Joe Crawford in a two-count indictment charging them, in one count, with assault and battery upon Faye Jarrell Esposito with intent to have unlawful carnal knowledge of her and, in the other count, with assault upon her with intent to commit murder in the first degree.

A severance was granted as to Crawford. On January 15, 1968, the defendant, represented by retained counsel, en-

tered a plea of guilty to an attempt to commit a felony. At the same time, his son, represented by the same counsel, pled guilty to assault with intent to commit murder in the first degree. The defendant executed a written plea of guilty and a waiver of appeal.

The District Attorney General explained the facts of the case to the jury and the defendant's attorney agreed that the testimony of witnesses would have been substantially the same. The Court specifically inquired of the defendant about the voluntariness of his plea of guilty; the defendant answered that he understood he was pleading guilty and that his plea was voluntary. To a question by the Court his counsel replied that the defendant had signed the plea of guilty and waiver of appeal. The District Attorney General had told the jury of the recommendation that the punishment of the defendant be fixed at eleven months and twenty-nine days in jail and, for Burdette, Jr., a maximum of ten years in the penitentiary. After the Court explained the recommendation, the jury retired and returned, making their verdict in accordance with the recommendation as to each. The trial judge thereupon sentenced the defendant and his codefendant.

On February 14, 1968, the defendant, represented by different counsel, filed a motion for a new trial, which was overruled March 1, 1968. The trial court declined to permit the defendant to file a transcript of the proceedings at the preliminary hearing. The defendant undertook to pray an appeal, but the trial judge denied it on the ground that he had executed a valid and voluntary waiver of a motion for a new trial and an appeal. A member of this court granted certiorari and supersedeas and the matter is now before us.

The defendant has filed a motion in this court seeking to file a transcript of the record of the preliminary hearing certified by the general sessions judge. We know of no authority for filing such a record here, and this motion is denied. He also assigns as error the refusal of the trial judge

to permit him to make this transcript an exhibit to his motion for a new trial. The record of the preliminary hearing was not a part of the trial below, and was not used to impeach any witness. We do not think the trial judge erred in declining to permit it to be made an exhibit. Since it was not an exhibit below and is not a part of the bill of exceptions, we cannot consider it.

The statement of the District Attorney General, which was not controverted, showed that Burdette, Jr., who had been drinking, held a pistol on the prosecutrix and made her disrobe but then let her put her clothes on, that she begged the defendant to help her, but he told her he was afraid his son would shoot him, that Burdette, Jr., finally decided that he had to go to the bathroom, but she refused to go there with him; that he gave the pistol to the defendant, who held it on her while Burdette, Jr., went there; when Burdette, Jr., was in the bathroom she begged the defendant to let her get away since he had the weapon; that the defendant refused and replied that she had better do what his son said, and no one would get hurt.

We think that this resumé of the facts related to the jury and stipulated and agreed as being the substantial facts and evidence in the case meets the requirements of T.C.A. 40-2310 for fixing the penalty on a plea of guilty. The assignments saying there is no evidence to support the verdict of guilty and that the evidence preponderates against it are overruled.

By assignments of error the defendant contends that he was forced at gunpoint to aid and abet his son, that he only pretended not to help the victim in order to save his life as well as hers and to prevent a tragedy, that his guilty plea was made only to obtain a smaller sentence for his son, and the evidence at the preliminary hearing shows that the defendant had no intent to harm the victim and was helpless to assist her. These allegations are not sustained by the evidence stipulated and presented to the Court and jury. The assignments based on them must be overruled.

Since certiorari was granted and we have considered the assignments challenging the plea of guilty and the evidence in the case, we do not find it necessary to consider the assignment that the trial judge erred in refusing to grant an appeal.

The judgment of the trial court is affirmed.

Judge Galbreath did not participate in this case.

/s/ Mark A. Walker
Presiding Judge

CONCUR:
/s/ W. Wayne Oliver